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UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/702
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 702

Case No. 760: BEG

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Tasnim Beg, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 9 November 1993;

Whereas, on 10 September 1993, the Applicant filed an application requesting the Tribunal, inter alia:

> "[To order the production of certain documents and the examination of witnesses]
>
> Immediate reinstatement with full payment of salary and emoluments as from 1 February 1992 and that she be kept on the payroll at her former rate until she is placed on a comparable post in UNICEF (or another UN Agency) in a country other than Pakistan. ...
>
> Should the Administrative Tribunal decide that the above is not possible until completion and full review of the case, immediate payment of salary and emoluments as from 1 February 1992 to September 1993 (time of this application) and that she be kept on the payroll after that at her former rate until the final consideration has been completed by the Tribunal and the Applicant informed of the decision. These payments to be treated as an advance. ...

> If for any reason, ... the Applicant is not re-instated, the advance payment noted above to be adjusted against payment of Termination Indemnity equivalent to two year's salary and allowances as recommended by the Joint Appeals Board, (...) along with compensation noted below.
>
> ...
>
> (i) If for any reason, the Applicant is not re-instated, an amount of compensation sufficient to maintain the Applicant at a standard that is on average, progressively maintainable by a person of her professional qualifications and experience for the remaining years of her active working life. (Retirement age based on international standards.)
> ...
>
> (ii) Appropriate compensation for the harassment suffered within the Organization and from outside sources because of the Applicant's employment with the Organization.
> ...
>
> ...
>
> (i) Full protection from any investigations/ actions by Government agencies or other persons ensuing from the Applicant having been put on the intelligence files of the government of her own country because of employment with the Organization. (...)
>
> (ii) Reimbursement of all expenses incurred on preparation correspondence and submission of Rebuttal of 1990 PER, Appeal and this application. ...
>
> (iii) All remaining actions requested in the appeal to Joint Appeals Board (...) ... "

Whereas the Respondent filed his answer on 5 August 1994;

Whereas the Applicant filed written observations on 18 April 1995;

Whereas, on 18 April 1995, the Respondent submitted further documents;

Whereas, on 15 May 1995, the Applicant submitted additional documents;

Whereas, on 29 June 1995, the President of the Tribunal ruled that no oral proceedings will be held in the case;

Whereas, on 28 June 1995, the Tribunal put questions to the Applicant to which she provided answers on 29 June 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF, as Chief, Finance and Budget Section, UNICEF Islamabad, on 9 April 1987, on a two year fixed-term appointment at the National Officer (NO) "C/III" level. In April 1989, her appointment was renewed for two years, through 30 April 1991. The Applicant was promoted to the NO "D/II" level, with effect from 1 January 1991. Her appointment was extended for two months on 1 May 1991 and on 1 July 1991, and for three months on 1 September 1991. She was put on leave with pay from 1 September through 30 November 1991. Her appointment was extended, on special leave, from 1 December 1991 through 31 January 1992, when the Applicant separated from the Organization.

During her service with UNICEF the Applicant's performance was evaluated in four performance evaluation reports (PER). In the first covering the period 9 April through 31 December 1987, the UNICEF Representative in Islamabad, who was the Applicant's First Reporting Officer, noted:

> "[The Applicant] does not accept things as they are, but sometimes challenges established practices if she feels they are wrong, inadequate or not according to the UNICEF rules. These characteristics are a great asset to a Finance Officer, but requires 'guts' to display in an office environment of the type we have in Pakistan. [The Applicant] has what it takes and that has earned her respect."

Prior to his departure, the UNICEF Representative evaluated the Applicant's performance from 1 January 1988 through 31 August 1988 in a second PER, stating under "Competence" that the Applicant was "a fully professional and competent Finance and Budget Officer and the year under review gave her an opportunity to demonstrate this on the job, carrying the budget submissions to a successful conclusion." He further stated:

> "I also wish to pay tribute to the staff-members (sic) doggedly persistent efforts to bring about improved monitoring and analysis of administrative expenditures ... In view of the gaps in financial and administrative monitoring and control which had developed in the office over some period of time, staff member's energetic efforts to catch up with the backlog, in spite of inertia and lack of enthusiasm in many quarters, is a noteworthy achievement as such ...
>
> ... Staff member has several personal characteristics which have and will, serve her well in her career: high sense of responsibility, high integrity and moral courage. She follows her sense of duty without anxiously looking over her shoulder whether what she says and does is making her popular or not ... Her position in the UNICEF, Islamabad Office, as a newcomer and a woman - the first female section-head among National Officers - made her vulnerable in a still male-oriented, traditional office environment. She handled that very well, but in the process she also generated some resistance ... I have great respect for [the Applicant] and a high appreciation of her contribution to our work."

In the same PER, the UNICEF Regional Director, as Second Reporting Officer, stated the following:

> "I am sufficiently well acquainted with the [Applicant's] work and I share the comments made by the First Reporting Officer. [The Applicant] has a good potential for a career with UNICEF."

In January 1989, an audit of the UNICEF offices in Pakistan was conducted. In his report, the auditor listed a number of issues where "corrective action has been initiated." With regard to the Finance and Budget Section, he noted that the Section had been "headless" for a period of 16 months, prior to the Applicant's appointment, during which time it had not functioned properly. Financial Rules and Regulations had not been strictly enforced and some unwanted operational habits had developed.

On 2 April 1989, the new UNICEF Representative for the Islamabad Office recommended that the Applicant's appointment be extended for two years. On 16 September 1990, he evaluated the Applicant's performance for the period from January through December 1989, in accordance with the new performance evaluation system. On

a scale of 1 to 5 (highest), the Applicant was given "4" for Professional Competence and for Productivity, "3" for Communication Skills and Supervisory Skills, and "2" for Work Relationships. He commented on her Work Relationships as follows:

> "The staff member works in the difficult environment and is doing a very conscientious job. Consequently, she faces occasionally difficult situations and some tensions with her colleagues are created. There has been a progress in her work relationships, but further efforts are required on her part."

In signing the report, the Applicant commented in the Section on Work Relationships as follows:

> "I would appreciate more detailed/frequent discussion and assistance from my supervisor in resolving this area, as I think that the problem is to a great extent inherent to the nature of work required of me."

In a memorandum, dated 27 September 1990, the UNICEF Representative informed the Chief of Personnel, Islamabad, "I am happy to recommend the promotion of [the Applicant] to NO-D effective 1 July 1990" (the Applicant's post had been upgraded to the "D" level in April 1989). He asked that the case be considered by the NO Appointment and Promotion Committee (APC). On 2 October 1990, the NO APC considered this recommendation. Noting the Applicant's 1989 performance evaluation of her "work relationships" as "passable", and that "almost the same reflection under this item was there in her 1988 PER" the NO APC recommended, inter alia, that the promotion be postponed until the end of 1990, "to establish a change and improvement in the working relationships of the [Applicant]."

In a handwritten note, dated 4 October 1990, on the minutes of the NO APC meeting, the UNICEF Representative recommended to the Regional Director "the promotion of [the Applicant] effective

1 January 1991, without any conditions." He stated that he had had "frequent discussions" with the Applicant. His recommendation was subsequently approved by the UNICEF Regional Director.

On 11 October 1990, the Applicant wrote to the UNICEF Representative, putting on record her disappointment at the postponement of her promotion. Expressing her agreement that the issue of her "working relationships" needed to be resolved, she noted that the problem had not been created by her and that the real issue resulted from her responsibility to enforce the Organization's financial rules and regulations. This was "a task that by its very nature causes irritation and aggravation for my other colleagues." She attached a list of problem areas and requirements not always complied with.

On 18 March 1991, the Chief, Personnel and Administration Section of the Islamabad Office, requested a recommendation from the UNICEF Representative, concerning the Applicant's future employment, noting that she was eligible for consideration for a probationary appointment.

An audit of the Islamabad Office carried out by UNICEF Headquarters in April and May 1991, reported that payment requests had not been designed to show clearly that the various responsibilities of certifying, approving and paying transactions were being carried out in accordance with the Controller's specifications. The auditors reported that, as a result of those shortcomings, friction and delays tended to occur during payment transactions.

The audit report noted that personal relationships between Section Heads and the Applicant had virtually broken down, due to inadequate familiarity with the controls exercised by the Applicant. The auditors noted that this had "unfortunately reflected adversely in the performance evaluation of [the Applicant]" and recommended that the "adverse performance evaluation" of the Applicant in the area of "personal relations" be "duly reconsidered". In reply, the UNICEF Islamabad Office commented, "The performance of all staff is evaluated in accordance with the new Performance Appraisal System

("PAS"). We believe that if that system is inadequate, then the auditors may suggest ways of improving it."

The Applicant's appointment was extended in mid-May, with effect from 1 May 1991, for two months, and again with effect from 1 July 1991, for two months. The Applicant signed her second two month letter of appointment, adding a memorandum, dated 3 July 1991, in which she informed the UNICEF Representative that she was accepting the two month appointment "without prejudice to my case for probationary appointment." She noted that according to practice and the Personnel Administration Manual (PAM), a probationary appointment was to be considered upon completing four years service, which she had done in April 1991. She further noted "I was promoted wef [with effect from] January 1991 and the auditors during their recent visit reiterated that my functions as a Budget/Finance Officer were properly carried out," concluding "I have fully satisfied the conditions laid down in the PAM regarding probationary appointments."

After sending him a memorandum dated 30 July 1991, the Applicant met with the UNICEF Regional Director, on 1 August 1991. In her memorandum, she gave an account of her situation in the office and requested "rectification" of her 1989 PER. She also asked for a decision on her probationary appointment, and "an early transfer out of this office" or alternatively, "a temporary assignment elsewhere or an appropriate training programme". Failing these possibilities, she requested "a grant of special leave pending resolution of this matter."

On 5 August 1991, the Applicant's performance evaluation for the year 1990, was completed by the UNICEF Representative. The numerical ratings were the same as for the previous year. In the section on Work Relationships, he noted:

> "I continued to receive complaints from her colleagues. Though I note some efforts made on her part to improve her working relationships, the overall outcome was not satisfactory. I expect her to have maturity in dealing with her colleagues."

On the same date, the UNICEF Representative forwarded a copy of the Applicant's evaluation to the Chief, Personnel and Administration Section. He stated that he could not recommend that the Applicant be granted a probationary appointment. He requested a two month extension of the Applicant's appointment pending a final decision on her probationary appointment.

On 27 August 1991, the Appointment and Promotions Committee (APC) reviewed the Applicant's case. The APC recommended that as "the [Applicant] has no positive problem solving style of work or a constructive approach and was unable to improve her working relations in spite of consistent support from the supervisor," she not be granted a probationary appointment and that she be separated from UNICEF.

On 1 September 1991, the Applicant's appointment was extended for two months. On 17 September 1991, the Chief, Personnel and Administration Section, Islamabad, informed the Applicant that the UNICEF Representative had not recommended her probationary appointment to the APC. The APC had recommended that she be separated from the Organization. He further informed the Applicant that the UNICEF Representative had requested that she be put on special leave with full pay for a period of three months, through 30 November 1991 and that this "will give you sufficient time to seek alternative employment."

On 16 October 1991, the Applicant signed her 1990 PER, noting her disagreement with most of its ratings and comments and stating "the PER is prejudiced by events both prior and subsequent to the period under review. PAS procedures have not been followed either in letter or in spirit." On 30 October 1991, she submitted further comments on the PER, noting that the evaluation had been prepared during her absence and that her supervisor had not commented on the quality and frequency of performance related discussions. She stated that consultation between her and her supervisor had consisted of her sending him routing slip messages, to which he had not responded, leading her to assume that he agreed with their content.

In a letter of 16 October 1991 to the Deputy Executive Director (Operations), the Applicant submitted a rebuttal of her 1990 PER, noting that she had received a separation notice while on leave. She stated that she had experienced harassment and victimization for carrying out her assigned functions and offered to provide further details of the nature of the harassment. In a document of the same date, the Applicant set forth numerous cases relating to financial issues which had arisen in the UNICEF Islamabad office.

On 9 November 1991, the Applicant requested the Secretary-General to review the decision to separate her from service. With effect from 1 December 1991, the Applicant's appointment and her leave were extended to 31 January 1992. On 13 January 1992, the APC again reviewed the Applicant's contractual status and her 1990 performance evaluation, and her rebuttal. Finding that "the appeal brings in no change in the substance of the case, which could justify reversal of earlier recommendations," the APC recommended that the Applicant's appointment not be extended further. On 21 January 1992, the Applicant was informed that her appointment would not be extended beyond 31 January 1992.

On 30 January 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In a communication dated 31 March 1992, the Deputy Executive Director (Operations), UNICEF, confirmed the decision of the UNICEF Representative to separate her from service. She rejected her contention of prejudice by her supervisor as well as her contention that her work relationship problems arose as an inherent function of her role as Finance Officer.

The JAB adopted its report on 8 June 1993. Its considerations, findings and recommendations read, inter alia:

> "30. The Panel found good reason to believe that the review by the APC was tainted. The Minutes of the APC meeting held in 1990 to consider [the Applicant's] promotion states that ... her work relationships were found 'passable' in 1989 and almost the same reflection under this item was there in her 1988 PER as well. This is a demonstrable misrepresentation of the facts. Compare it with the excerpts from the 1988 PER

by [the previous Chief, Islamabad Office] in para.4 above, or with the full text in [the Applicant's] official status file.

31. The 1991 APC which recommended her termination included at least two officials to whom, on the evidence of the material in the file, queries had been addressed by [the Applicant] in her capacity of Chief, Finance and Budget, and who - not to put it too strongly - were not pleased by her intervention. They were ... Chief, Supply & Programme Operations, and [another staff member]. A third member - ... - was, if the Panel read ... correctly ... not a person disposed to give the benefit of the doubt to a woman Chief of Section ...

33. Under the circumstances, the Panel felt that it was natural for [the Applicant] to press forward. It was equally normal for there to have been resistance; few people like change, and old habits - especially bad ones - die hard. Given the 'male-oriented, traditional office environment,' even the most diplomatic of women finance officers would have encountered resistance. In the Panel's view, the degree to which [the Applicant] could have successfully overcome that resistance depended in large degree on the support she was given by the Head of the Office. According to [the Representative], she got it; according to [the Applicant], she did not. The Panel sought any clue that might throw light on the relationship.

34. There were three. In 1991, the auditors from UNICEF Headquarters recommended that [the Applicant's] 'adverse performance evaluation ... on personal relations' should be reconsidered. The snide response ... could hardly have been made without, at least, the tacit consent of [the Representative]. In July 1991, [the Applicant] sought and obtained an interview with the Regional Director. In his memorandum of 5 August 1991, to [another staff member], concerning [the Applicant's] contractual status, [the Representative] gratuitously characterized the interview as 'her complaints against myself and her colleagues.' Finally, in commenting on her 'Explanation/rebuttal of 1990 PER,' [the Representative] repeated the factual misrepresentation made earlier by the APC in an even more blatant form. He said, 'her 1989 PER was not a shock to her, because it was very similar to the one done by her earlier supervisor who also gave her "2" for her working relationship.' The PAS with numerical ratings had not yet been introduced in 1988.

Findings and Recommendations

36. For the above reasons, the Panel found that bias and discrimination played a part in the decision not to renew

[the Applicant's] fixed-term appointment. Some reaction on the part of her colleagues and supervisor may have been natural and understandable as a result of the normal resistance to change. However, there was no justification for the extreme form that reaction finally took. The Panel found that not only had she been unfairly terminated, but that she had been deprived of the full and fair consideration for a career appointment to which she was entitled.

37. The Panel recommends that [the Applicant] be reinstated with full payment of salary and emoluments as from 1 February 1992, and that she be kept on the payroll at her former rate until she is placed on a comparable post in UNICEF (or another UN Agency) in a country other than Pakistan.

38. If, for any reason, the above recommendation is not implemented, the Panel recommends that [the Applicant] be paid an indemnity equivalent to two years' salary and allowances".

On 15 July 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General, after review of the report of the JAB, has decided not to accept the findings and recommendations in paragraphs 36 and 37. The Secretary-General does not accept the conclusion drawn by the Board that it was bias and discrimination in the UNICEF Office in Pakistan that caused the non-renewal of your contract. However, it is noted that there were problems in inter-personal relations between you and your colleagues in the Office. He does not, furthermore, accept the recommendation of the Board to reinstate you in the service of UNICEF or another UN agency, for the reasons stated above and, under the terms and conditions of your employment as a national professional officer, your service is limited to the country of nationality.

With regard to the Board's recommendation contained in paragraph 38, the Secretary-General has approved the payment of termination indemnity only under the provision of staff regulation 9.3, Annex III, with an additional 50 % compensation taking into account the circumstances that lead to the non-renewal of your contract, instead of the 20 months salary and allowances recommended by the Board. In computing the indemnity you will be considered as having served for a full five-year period on a temporary appointment (which is not for a fixed-term appointment), including the last five

months of your service with UNICEF when on special leave with full pay. This will result in an indemnity payment for a maximum of six months under the above regulations."

On 10 September 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Her difficulties with her colleagues resulted from the very nature of her job requiring her to ensure compliance with the Financial Regulations and Rules.

2. The recommendation by the APC not to grant the Applicant a probationary appointment was tainted by prejudice, as a majority of its members were colleagues who resented her efforts to restore financial discipline.

3. The decision not to grant the Applicant a probationary appointment and to separate her from UNICEF was vitiated by prejudice against her because she was a woman working in a traditional male-oriented environment.

Whereas the Respondent's principal contentions are:

1. The Applicant has produced no substantive evidence showing that the decisions not to grant her a probationary appointment and to separate her from UNICEF employment were vitiated by prejudice.

2. The findings of the JAB are not supported by evidence.

The Tribunal, having deliberated from 28 June to 27 July 1995, now pronounces the following judgement:

I. This is an appeal from a decision dated 15 July 1993, in which the Secretary-General rejected the JAB's findings and recommendations, as well as its conclusion of bias and discrimination. The Respondent did not accept the JAB's recommendation that the Applicant be reinstated, noting that under

the Applicant's terms and conditions of employment as a National Professional Officer, her service was limited to her country of nationality. The Respondent did, however, approve, in part, the JAB's recommendation to pay the Applicant an indemnity, by paying her a termination indemnity, in accordance with staff regulation 9.3, Annex III, with an additional 50 per cent of compensation, taking into account the circumstances which led to the non-renewal of the Applicant's fixed term appointment.

II. The Applicant's principal contention is that the Respondent's decision to separate her from service and not to grant her a probationary appointment were vitiated by bias and prejudice. In addition, she alleges that she was not given full and fair consideration for a career appointment. The Applicant requests reinstatement and transfer to a comparable post in another country. Alternatively, she requests payment of her salary as from February 1992 to September 1993, and to be kept on the payroll until the completion of the case. Should she not be reinstated, she requests payment of a termination indemnity equivalent to two years' salary as recommended by the JAB, plus an undefined amount sufficient to maintain her at a certain level for the remaining years of her active working life, and damages for harassment.

III. The Tribunal has held with respect to the non-renewal of fixed term appointments that:

> "... the Tribunal's jurisprudence has consistently maintained that while, under the Regulations and Rules governing fixed-term contracts, the Respondent has the unquestioned right to terminate such contracts, it must nevertheless be ensured that the decision to terminate must not be tainted by caprice, prejudice, falsehood or any serious lack of due process." (Judgement No. 345, Najjar)

In addition, the Tribunal has consistently held that "the burden of proving prejudice or other improper motivation lies with the Applicant." (Cf. Judgement No. 465, Safavi)

The Tribunal believes that the central issue of this case is whether the Respondent's discretionary decision to separate the Applicant from service and not to grant her a probationary appointment was vitiated by prejudice or other improper motives.

IV. The Tribunal, in deciding this case, considered the following factors to be of particular significance:

1. The Applicant was working in an office characterized by a UNICEF Representative as a "male oriented traditional office ..." The Applicant's gender, and her oversight responsibilities over male colleagues, appear to have influenced their reactions to her. Moreover, there is other evidence before the Tribunal in affidavits submitted on behalf of the Applicant in connection with her application that she was subjected to discrimination. Indeed, one male colleague, whose four year service with UNICEF virtually coincided with the Applicant's tenure, noted in his affidavit that the Applicant "suffered from the fact that she was a 'dynamic' unmarried national female officer" and that she "was further disadvantaged by the fact that when her management style was being assessed, far different criteria were employed than when her male colleagues were assessed."

2. Before the Applicant's appointment as Chief, Finance and Budget, the post had been vacant for 16 months. There was evidence that, during that time, laxness had developed in the financial administration of the office and that there might well have been cases of fraud.

3. The Applicant's supervisor, who was Head of the Office, as well as both regional and local auditors, encouraged her to continue her efforts to regularize financial procedures.

4. The auditors noted that the interpersonal problems were due to the lack of knowledge by her colleagues of the Applicant's role. They recommended that her adverse performance evaluation report be reconsidered.

5. Due to the inherent nature of the Applicant's work, it was not surprising that her interventions would create resentment and resistance.

6. At no time did anyone question the Applicant's professionalism, competence and ethical standards. Throughout, this professionalism was maintained despite the tense environment in which she found herself.

In addition, the Tribunal takes into account UNICEF's Recruitment Principles and Priorities which establish that in the fulfillment of stated UN policies expressed by the General Assembly in its resolutions 45/239C, 46/100 and 47/93 priority consideration should be given to qualified women candidates.

V. The Tribunal believes that the Applicant's principal function was to ensure that financial regulations and rules were properly respected and financial discipline maintained in the Islamabad office. No one could reasonably expect that in carrying out her functions, the Applicant would necessarily be popular with her colleagues. While working "in a collegial fashion" was certainly a desirable objective, it could hardly take precedence over the necessity of discharging her responsibilities effectively. This does not in any way mean that the Applicant should not have made reasonable efforts to have good working relations. Indeed, it appears to the Tribunal that she did so. That she might not have been successful should not have determined whether she should receive a probationary appointment. The extraordinary importance attached to collegiality in the circumstances here, coupled with gender bias, constituted arbitrariness. The Tribunal finds it surprising that an organization such as UNICEF, which has reportedly been victimized by financial improprieties, would not have rewarded the Applicant's insistence on scrupulous compliance with financial regulations and rules, at the expense of being a favourite among her colleagues, by a probationary appointment rather than penalizing her by separation. For, it would seem clear that the Organization is

sorely in need of more, not fewer, financial officers with her qualities of selfless integrity and perseverance.

VI. The Tribunal agrees with the JAB that "the review by the APC [Appointment and Promotion Committee] was tainted". The persons making the recommendation regarding the suitability of the Applicant for probationary appointment were the very persons who were potential targets of the Applicant's interventions. Consequently, the Applicant was not accorded full and fair consideration when she was deprived of the possibility of a career appointment. Beyond this, the Tribunal finds that the evidence in the file compels the conclusion that both the Applicant's efforts to perform her functions responsibly and her gender were significant elements motivating the decision under challenge. This plainly constitutes non-observance of her terms of appointment, as well as a violation of important organizational policies for the advancement of women.

VII. For the foregoing reasons, the Tribunal:

A. (1) Rescinds the decision of the Respondent dated 15 July 1993;

(2) Orders that the Applicant be reinstated to the position she held as of 31 January 1992, or a comparable position, with full payment of salary and emoluments from that date, less her earnings from other employment;

(3) Further orders the Respondent to grant the Applicant a probationary appointment, from the date her reinstatement takes effect.

B. Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to the Applicant at three years of her net base salary, without deduction of earnings from other employment. In so doing, the Tribunal finds, in accordance with article 9 of its Statute, that this case is exceptional for the reasons set forth in the JAB's

report as well as for her lengthy loss of remuneration. The Tribunal also, thereby, takes account of its findings that the decision to separate the Applicant was partly motivated by gender discrimination, and partly by the fact that she was performing her functions thoroughly. Under such circumstances, the Applicant has been subjected to exceptional distress and moral injury.

C. Strongly urges the Secretary-General to ensure that, further reviews of her performance by her supervisors and by others, will be conducted on the basis of objective criteria and that her treatment will be free from gender bias.

VIII. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 27 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

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28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 703

Case No. 764: LARSEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mayer Gabay;

Whereas, on 3 September 1992, Cheryl Beth Larsen, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 October 1993;

Whereas, on 29 October 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"(b) ...

(i) [To rescind] the decision by OHRM in September 1990 not to recognize my home country as Australia and not to grant international entitlements in accordance with my designated home country.

(ii) [To rescind] the decisions taken by OHRM on 3 and 29 April 1991 not to reinstate Australia as my home.

(c) ...

(d) [To order] compensation for any home leave visit denied as a result of the above-mentioned decisions.

(e) ...

(i) Recognition of my home country as Australia without a break in continuity from 30 May 1986.

(ii) Determination of all international entitlements in accordance with my home country and continuous with my service within the United Nations system (i.e. from 30 May 1986)."

Whereas the Respondent filed his answer on 24 November 1993;

Whereas the Applicant filed written observations on 30 March 1994;

Whereas, on 7 July 1995, the Tribunal put a question to the Applicant and on 12 July 1995, she provided her answer thereon;

Whereas, on 14 July 1995, the Respondent submitted an additional document and on 17 and 24 July 1995, the Applicant commented thereon;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, entered the service of the International Atomic Energy Agency (IAEA) on 30 May 1986. By interagency transfer, on 1 September 1990, the Applicant joined the Department for Technical Cooperation for Development (DTCD) on a two-year fixed-term appointment.

In a telex dated 24 May 1990, the Director, Division of Personnel, IAEA, conveyed to the Office of Human Resources Management (OHRM) at Headquarters the Applicant's concern that her entitlement to home leave in Australia be recognized. In a further telex dated 6 June 1990, he explained:

"[The Applicant] was originally granted home leave to Australia for the following reasons:

1. For 11 years prior to joining IAEA she had resided in Australia.

2. All her professional working experience and professional ties were in Australia.

3. Conditions of her Australian residential permit require her to return to Australia once every 3 years.

4. The father of her young daughter and family reside in Australia.

For the above reasons IAEA recommends that her home leave to Australia status be recognized by the UN."

In a reply dated 19 June 1990, the OHRM at Headquarters informed the Director, Division of Personnel, IAEA, that "it has been concluded that [the Applicant] as USA national serving in her home country will not be entitled to any international entitlements, including home leave."

On 21 February 1991, the Applicant wrote to the Officer-in-Charge, OHRM. After citing the exceptions to the general principles of home leave contained in the Report on the Committee of Experts on Salary, Allowances and Leave Systems (the Fleming Committee Report), she requested that the exceptions set forth in the Fleming Committee Report be applied to her case and asked "that the designation of Australia as my home be reinstated."

In a reply dated 29 April 1991, the Applicant was informed that under staff regulation 5.3 and rule 105.3(b), she had met the conditions of eligibility for home leave while serving in Austria, a country of which she was not a national. However, "once she had moved to the country of which she was a national, she was no longer an expatriate and she no longer met the basic condition of eligibility for international benefits, including home leave ..."

In a memorandum dated 24 June 1991, the Applicant requested the Secretary-General to review this administrative decision. On 8 October 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 16 July 1992. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

The Panel [noted that] ... the first aim of home leave was to serve the interests of the United Nations by conserving within the Secretariat the different cultures of the home countries of the staff members while the second aim was to afford the staff members concerned and their families a measure of compensation for the disadvantages of expatriation by giving them the opportunity to renew professional and personal contacts in their home countries. The Panel agreed that allowing the Appellant to take home leave in Australia would further the first of these aims. At the same time, the Panel could not consider as unreasonable the Appellant's contention that, in her circumstances, the disadvantages of expatriation would be alleviated if she were allowed to take home leave in Australia. The Panel noted that it was apparently on that basis that the IAEA had recognized Australia as her home country for home leave purposes. Respondent has stated that, in so doing, IAEA had applied provisions in its Staff Rules similar to those contained in United Nations staff rule 105.3 (b)(ii)a. That rule provides that the Secretary-General may, in exceptional and compelling circumstances, authorize that a country other than that of the staff member's nationality be considered as his or her home country for purposes of home leave. However, the Respondent propounds that this rule cannot be applied in the case of the eligibility for home leave to any staff member unless he or she is stationed in a country other than that of his or her nationality. The Panel did not believe it could contest this proposition.

31. The only issue remaining before the Panel was therefore whether, as the Appellant contends, staff rule 105.3(b)(i)a. does not reflect the decision of the General Assembly in adopting the language now included in staff regulation 5.3 and that therefore that particular staff rule as applied in her case, deprives her of a benefit which she would have normally received under that regulation. The Panel was unable to credit this contention. The Panel recalled that, when the General Assembly adopted the permanent Staff Regulations in 1952, it stipulated that the Secretary-General should provide Staff Rules consistent with the broad principles of personnel policy which the Staff Regulations represented. The Panel could not agree that the broad principle enunciated in staff regulation 5.3 was violated by the denial of home leave to a staff member who was stationed in the country of her nationality.

Conclusions and recommendations

32. In view of the above, the Panel concluded that the Appellant's terms of employment had not been violated by the decision not to recognize Australia as her home country for home leave purposes.

33. The Panel therefore makes no recommendation in favour of the appeal."

In a memorandum dated 3 August 1992, the Assistant Secretary-General, OHRM, transmitted a copy of the JAB report to the Applicant and informed her, inter alia:

> "The Secretary-General has re-examined your case in the light of the Board's report. He concurs with the Board's conclusion that your terms of employment had not been violated by the decision not to recognize Australia as your home country for home leave purposes. ..."

On 29 October 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff rule 105.3(b), which limits eligibility for home leave to expatriates, does not accurately reflect and is not consistent with the intention of staff regulation 5.3 and its legislative foundation, as set forth in the Fleming Committee Report.

2. The Applicant's personal and professional ties are in Australia, which should therefore be considered her home country.

3. The Applicant's designated home country was part of her official record of transfer from IAEA and could not be altered by the United Nations pursuant to the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances.

Whereas the Respondent's principal contentions are:

1. The Applicant's receipt of home leave benefits from IAEA while serving away from her country of nationality does not create a right to home leave while serving the UN in her country of nationality.

2. No established practice exists which makes home leave available to staff serving in the country of nationality. Staff are bound by explicit provisions of the Staff Regulations and Rules, and staff rule 103.5(b) is consistent with the Staff Regulations.

The Tribunal, having deliberated from 5 to 27 July 1995, now pronounces the following judgement:

I. The Applicant, a national of the United States of America, left that country at the age of 22 and settled, first in the United Kingdom and then in Australia, where she lived for ten years. During that period she obtained permanent residency status in Australia and held a permanent position in the Australian civil service. In her submission to the JAB, she also claimed that she "had an established home and property in Australia" as well as "[her] professional contacts and network, many personal friends and family".

II. In April 1986, the Applicant was recruited to serve with the International Atomic Energy Agency (IAEA) and moved to Vienna, Austria. Her status was that of an internationally recruited staff member and, she was, therefore, entitled to home leave. She declared Australia as her home country and IAEA granted her home leave to that country. In September 1990, she was transferred from IAEA to the United Nations Headquarters in New York. Prior to her transfer, she raised the question of her future entitlement to home

leave. IAEA conveyed the Applicant's concern to the United Nations on 24 May 1990. On 19 June, United Nations Headquarters replied that the Applicant would not "be entitled to any international entitlement including home leave".

III. The Applicant, nevertheless, accepted her transfer and signed her letter of appointment on 27 September 1990. On 21 February 1991, the Applicant wrote to the Office of Human Resources Management, requesting that the designation of Australia as her home leave country be reinstated. Her request was rejected. She subsequently contested this decision before the Joint appeals Board (JAB) which upheld the Respondent's decision.

IV. The Tribunal considered the issue of time-limits raised by the Respondent before the JAB. The Respondent claimed that "the Appellant had raised the issue of her entitlement during the course of negotiation for her transfer, and was informed in June 1990 that as a United States national serving in her home country she would not be entitled to home leave". Almost ten months later, "and eight months beyond the mandatory time-limit", the Appellant sought to have this decision reviewed. The JAB waived the time limits and considered the case on its merits. The Respondent did not object. The Tribunal therefore decided to consider the case on its merits.

V. Having examined the Applicant's claims, the Tribunal finds that:

(a) Staff rule 105.3(b)(i) clearly excludes from the home leave benefit staff members who reside in the country of which they are nationals;

(b) The Applicant, a US national, clearly falls under the provisions of staff rule 105.3(b)(i);

(c) The provisions of staff rule 105.3(b)(i) in no way contradict staff regulation 5.3.

VI. The Applicant argues that the expression "home country" in staff regulation 5.3 is not equivalent to the expression "country of nationality" in staff rule 105.3(b)(i). The Tribunal does not agree. In the Tribunal's view, the Respondent's interpretation which equates the quoted expressions is entirely reasonable, and well within the Administration's competence. Furthermore, it is consistent with General Assembly resolution 470-V, paragraph 4.

VII. The Applicant's reliance on the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the UN common system of salaries and allowances is misplaced. It does not constitute a basis for claiming rights against the receiving organization. Indeed, paragraph 1(b) of the Agreement clearly states that it "does not give the staff member rights which are enforceable against an organization".

VIII. Similarly, the Applicant's contentions with respect to the possibility of the Secretary-General authorizing a change in the place of home leave as envisaged in staff rule 105.3(d)(iii) are also lacking in merit. That staff rule applies only to staff members entitled to home leave, not to those who are not entitled to it.

IX. The Tribunal finds that the Applicant was duly informed by the United Nations before her transfer that she would not be entitled to home leave after moving to the United States of America. The United Nations was in no way responsible if the Applicant was, as she alleges, informed by officials of IAEA that her home leave entitlement would not be affected by her transfer.

X. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mayer GABAY
Member

Geneva, 28 July 1995

B. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/704
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 704

Case No. 768: EL-BATTOUTY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Sen, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Maher El-Battouty, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 30 November 1993;

Whereas, on 23 November 1993, the Applicant filed an application requesting the Tribunal, inter alia, to order:

"...

- Restitution of his professional status as indicated in his performance reports prior to the abuse of which he was a victim.

- Recognition and implementation of his functions as specified in his job description (...).

- Recognition of his seniority in ORES with what it entails, without discrimination by reasons of mother tongue.

- Adequate compensation for all forms of damage and psychological anguish suffered by him during years of abuse.

> [To make] a pronouncement against the unethical practices, as defamatory petitions and other practices, used by supervisors in the United Nations."

Whereas the Respondent filed his answer on 6 July 1994;

Whereas the Applicant filed written observations on 27 February 1995;

Whereas the facts in the case are as follows:

The Applicant, an Egyptian national, entered the service of the United Nations on 19 March 1978, as an Associate Translator at the P-2, step II level, in the Department of Conference Services (DCS). On 3 October 1979, he received a probationary appointment and on 1 March 1980, he was promoted to the P-3 level. On 1 July 1980, his appointment was converted to a permanent one. With effect from 16 March 1981, the Applicant was transferred to the Official Records Editing Section (ORES) as an Editor. He was promoted to the P-4 level with effect from 1 April 1982.

In a memorandum to the Director, Recruitment and Placement Division, Office of Human Resources Management, dated 2 February 1992, the Applicant submitted his candidacy for the post of Chief, ORES, which was to become vacant upon the forthcoming retirement of the incumbent.

In a memorandum dated 10 June 1992, the Director, Editorial and Official Records Division (EORD), DCS, informed the Chief, Editorial Service, EORD, of his decision to appoint another staff member as Officer-in-Charge of ORES upon the retirement of the Chief, ORES.

On 14 August 1992, the Applicant requested administrative review of the decision not to appoint him Officer-in-Charge and of other practices within the Department. In a reply dated 16 September 1992, the Director, Staff Administration and Training Division, OHRM, informed the Applicant that the appointment of the other staff member was a continuation of the practice during the past four years of designating her Officer-in-Charge whenever the Chief was absent.

On 19 October 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 2 November 1992, the panel constituted to consider the Applicant's rebuttal recommended the deletion of certain comments made in the performance evaluation report (PER) and the upgrading of several ratings of his PER, covering the period from 1 October 1986 through 29 February 1992.

On 5 April 1993, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "Considerations and recommendations
>
> ...
>
> 27. The Panel noted that the decision of the Director to appoint another staff member as Officer-in-Charge, is a discretionary one and the Appellant did not produce the evidence to support his claim that the decision was made in bad faith or was motivated by prejudice or any other extraneous factor. The Panel recalled however that normally it is the highest ranking member of a Unit who serves as Officer-in-Charge, in the absence of the Chief; or, where there are several staff members at the same level, the position is rotated. The Panel, therefore, wondered why the Appellant had never been named to serve as Officer-in-Charge, and whether this has anything to do with the Appellant's performance or the language group the Appellant belongs to.
>
> 28. The Panel asked for the current status of the post in question (...). It noted from the Respondent's response dated 17 March 1993 (...) that the post in question would be filled upon completion of the 1992 promotion exercise, and that 'OCS [Office of Conference Services] has recommended a staff member for promotion to P-5, the level at which the post of Chief, ORES, has been classified; although seniority was not the primary consideration in our recommendation, the staff member recommended for promotion happens to have more in-service and in-grade seniority than the Applicant'.
>
> 29. On 16 February 1993, the Panel was informed by the Appellant (...) that the report of the rebuttal panel on the Appellant's performance evaluation review, was appraised by the Director, OCS, on 31 December 1992, and that all items rebutted had been upgraded and the derogatory comments deleted.
>
> 30. The Panel felt that the Performance Evaluation Report, together with the Director's appraisal, were vital to the Appellant receiving full and fair consideration by the APB

and therefore, recommends that the amended and completed performance evaluation review be placed before the appointment and promotion bodies before it completes its consideration of the 1992 promotion exercise for the P-4 to P-5 level in OCS.

31. The Panel noted that it was not within its competence to deal with the Appellant's request that the job description for Chief of the Arabic Group in ORES be changed so that the status of Arabic in ORES be made equal to that of English, French and Spanish, but felt it will be useful if the Administration look into the matter."

On 15 April 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He wishes to affirm that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. He agrees with the finding of the Board that the decision to appoint a staff member other than yourself is a discretionary one and that you did not produce evidence to support your claim that the decision was made in bad faith or was motivated by prejudice or any other extraneous factor ...

With regard to the Board's observation in paragraph 31 of the report, the Secretary-General wishes to remind that the revised job description approved on 16 April 1992, removed the prior condition and now requires excellent command of English, French and at least one other official language of the United Nations".

On 23 November 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to appoint him as Officer-in-Charge of ORES was discriminatory, as it was based on prejudice against the Arabic Group and a preference for native English speakers.

2. As the most senior staff member in ORES, the Applicant should have been appointed Officer-in-Charge of ORES.

Whereas the Respondent's principal contention is:

The decision not to appoint the Applicant as Officer-in-Charge of ORES was within the discretionary powers of the Administration and did not violate his rights. That decision was not tainted by prejudice or other improper motives.

The Tribunal, having deliberated from 5 to 28 July 1995, now pronounces the following judgement:

I. The main issue before the Tribunal is whether the Applicant was denied the opportunity to serve as Officer-in-Charge of the Official Records Editing Section (ORES) because of prejudice. The Applicant asserts that he was not only a victim of a conspiracy by some of his senior colleagues because of his being an Arab, but that he was systematically treated badly, without justification, by the outgoing chief of his section. Of the documentation he has produced to sustain his claim, more than half concerns two other staff members and an audit report of 1991 on the issuance of official records. Nonetheless, the Tribunal has examined all the material before it and concludes that while there is much evidence of the friction caused by the internal differences in ORES, there is nothing to establish that the Applicant was subjected to discrimination because he was an Arab or because his mother tongue was Arabic.

II. Even the observations of the JAB that "it would be useful to look into the job description" of the Applicant and the Respondent's comment that the system prevailing at the time constituted simply a measure of administrative efficiency and convenience, are far removed from any implication of ethnic discrimination against the Applicant.

III. In defending his decision not to select, even temporarily, the Applicant to be the Chief of the Section, the Respondent relies

entirely on his discretion - which has consistently been upheld by the Tribunal on all matters relating to posting and promotion, provided always that there was no bias, prejudice or other extraneous factors to vitiate his decision. The Respondent's failure to forward the Applicant's revised performance assessment to the appointment and promotion bodies, and his suggestion that the Applicant take such action himself, may be open to criticism, but does not constitute, in the view of the Tribunal, evidence of bias.

IV. The Tribunal notes that the latest performance evaluation report on the Applicant was prepared by the outgoing Chief of the Section on 20 March 1992, covering a period of 5 years and 5 months (1 October 1986 to 29 February 1992). No explanation has been given by the Respondent for the failure to submit regular reports and for preparing a report covering such a long period of time. This report was unfavourable to the Applicant and was rebutted by him, while earlier reports, from 1981-1986, had been generally excellent. The panel, which upheld his rebuttal in general, deplored the former Chief of the Section's refusal to attend and her failure to defend her judgement of the Applicant's performance. The Tribunal will not comment on the refusal by the former Chief of the Section to attend, as she had retired from the Organization.

VII. The Tribunal has considered these developments carefully and has come to the conclusion that no complaints of discrimination on ethnic or language grounds can be upheld. Furthermore, it concludes that in spite of procedural delays, irregularities and some indication of strained personal relations in the section, no evidence has been produced which could be construed as a violation of the Applicant's rights or a demonstration of prejudice. As a result, the Applicant's contention that his non-selection as Officer-in-Charge of Section was tainted by prejudice and extraneous considerations cannot be sustained.

VIII. Consequently, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-Presidemt

Mikuin Leliel BALANDA
Member

Geneva, 28 July 1995

R. ~~Maria~~ VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/705
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 705

Case No. 789: HUSSEIN

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 16 March 1994, Hussein Kamel Hussein, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application requesting the Tribunal, inter alia, to order:

> "1. Reinstatement of the Applicant to service in the reclassified post of camp services officer, Hama, and considering the period of cessation beginning on 1 March 1992 as special leave with pay.
>
> 2. The Respondent [to] abide by the UN Operational rate of exchange, prevailing on 1 March 1992 for the computation of separation benefits including termination indemnity of the Applicant, and [to] maintain that rate as prevailing for the following periods of service.
>
> 3. ... appropriate compensation in light of the injury and loss the Applicant sustained.
>
> 4. Payment of secretarial and counselling fees, estimated at US$2,000."

Whereas the Respondent filed his answer on 29 August 1994;

Whereas the Applicant filed written observations on 18 December 1994;

Whereas, on 24 June 1995, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 21 December 1977, as a Clerk in the Supply and Transport Department, Damascus Field Office, at the Grade 6 level. On 1 May 1980, the Applicant was promoted to the post of Senior Clerk, at the Grade 8 level. With effect from 15 October 1984, he was transferred to the post of Sub-Area Officer, Hama, and promoted to the Grade 9 level. The Applicant separated from service on early voluntary retirement, with effect from 29 February 1992.

In a letter dated 27 January 1992, the Field Administration Officer, Syrian Arab Republic (SAR), advised the Applicant that his post would be reclassified as Camp Services Officer, at the Grade 10 level, with effect from 1 March 1992. As the Applicant did not meet the qualifications of the new post, - a B.A. in Business or Public Administration and "good knowledge of written and spoken English", - he was declared "provisionally redundant".

The Field Administration Officer offered the Applicant the alternatives of the post of Storekeeper (Fuel Station) in the Damascus Field Office at the Grade 6 level, with grade protection, or early voluntary retirement, with the benefit of an advantageous exchange rate. He requested the Applicant to elect one of these alternatives by 6 February 1992.

In a memorandum to the Area Officer, Hama, dated 30 January 1992, the Applicant requested early voluntary retirement. In a memorandum, dated 6 February 1992, the Applicant asked the Field Administration Officer to transfer him to the 'established post', i.e. his present post. If that was unacceptable, he requested that

his appointment be terminated, with the early voluntary retirement benefit calculated at the favorable exchange rate. Referring to the matter as "a coercive offer," in the same memorandum, the Applicant submitted his resignation. In a letter dated 20 February 1992, the Field Personnel Officer, SAR, advised the Applicant that his request for early voluntary retirement had been approved.

In a memorandum dated 15 April 1992, to the Director of UNRWA Affairs, SAR, the Applicant objected to the reclassification of his post and the alternatives which had been given to him. He requested reinstatement. In a reply dated 17 May 1992, the Field Director advised the Applicant that his request could not be accepted, noting that the Agency had the right to reclassify the post and had offered him an alternative post with grade protection. On 17 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 30 September 1993, the JAB adopted its report. Its evaluation, judgement and recommendations read as follows:

> "V. Evaluation and Judgement
>
> 24. In its deliberations the Board resolved that while it is the prerogative of the Administration to reclassify any post as an administrative action in the interest of the Agency, the Appellant was given very short notice by letter of the Field Administration Officer dated 27 January 1992 whereby on the one hand the Appellant was declared provisionally redundant and on the other hand he was invited to opt for early voluntary retirement or, if otherwise decided, he would be offered the post of Storekeeper (Fuel Station), Grade 06, at Damascus Field Office with grade protection.
>
> In this regard and though the Board could not establish that the Administration's decision to declare the Appellant provisionally redundant was motivated by prejudice or any other extraneous factors, the Board is of the opinion that the above mentioned sequence of events and offer were conducive to the Appellant's coerced option for early voluntary retirement.
>
> VI. Recommendations
>
> 25. In view of the foregoing and without prejudice to any further oral or written submissions to any party the

Appellant may deem pertinent, the Board unanimously recommends that the Administration's decision of 27 January 1992 to reclassify the Appellant's post of Sub-Area Officer to Camp Services Officer with effect from 1 March 1992 and to declare the Appellant provisionally redundant be upheld.

However, the Board also wishes to recommend that the Appellant be given an opportunity to reconsider his option for early voluntary retirement with a view to reinstating him in a post commensurate with his qualifications."

On 16 December 1993, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, inter alia:

"I accept the Board's primary recommendation concerning upholding the decisions to reclassify your former post and to declare you provisionally redundant. As to the Board's further recommendation, there is no evidence whatever that your decision to take early voluntary retirement in preference to the offer of alternative employment made to you, and thereby take advantage of the considerable benefits exceptionally offered by Field Staff Circular No. 17/92 of 5 January 1992, was anything other than your own personal decision made for personal reasons. I therefore do not accept that your decision to take early voluntary retirement was in any way a 'coerced option' as suggested by the Board. Further, you have already been offered re-employment on two separate occasions; the first by way of reinstatement on 3 November 1992, which you declined, and the second, to accommodate you, on 8 February 1993, by way of reappointment, which you also in effect declined by stipulating that your appeal continue. Therefore, having carefully considered the Board's recommendation in this regard, I see no reason to once again re-open the question of your future re-employment with the Agency."

On 16 March 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The declaration of the Applicant as redundant was tainted with prejudice and was a violation of the Staff Regulations and Rules. The Applicant is more qualified for the reclassified post than its incumbent.

2. Changes made in the exchange rates applicable to separation benefits violate the acquired rights of area staff members.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision was proper and in accordance with the rules. The Applicant's contention that it was motivated by bias and prejudice is belied by both the circumstances of the reclassification and the evidence.

2. There was nothing coercive in the offer of voluntary early retirement. The Applicant was paid retirement benefits at the more favorable exchange rates, so even if he had an acquired right to the exchange rate, it was not violated.

The Tribunal, having deliberated from 7 to 28 July 1995, now pronounces the following judgement:

I. The Applicant was made provisionally redundant when his post was reclassified from grade 09 to grade 10. He was given very short notice to decide whether he should take early voluntary retirement or accept a different job "with grade protection". He decided to take early retirement and he received all the money he was entitled to. This could have been the end of the matter.

II. But, as the JAB report shows from its detailed exploration of the background of the case, the Applicant later argued against the reclassification of his post from grade 09 to grade 10. He asserted that he was qualified for the reclassified post, and so should be re-instated in a similar post in his place of residence (Hama area).

III. The JAB concluded that, on the merits, the Administration was within its rights to reclassify the post but that the Applicant should have been offered an alternative post "commensurate with his qualitications". The Respondent did not accept the latter recommendation, arguing that the Applicant had been offered various employment possibilities, but none was acceptable to him. The Respondent maintained that the Applicant had retired for personal reasons and that there was no coercion on him to do so.

IV. Several exchanges took place between the parties, with a view to finding a solution. Included in those exchanges was a lengthy discussion as to what exchange rate should be used to repay the Applicant's separation benefits, if he were to be re-employed. These exchanges produced no solution and are not of relevance to the Tribunal's consideration of the case.

V. The only merit in the claim of the Applicant is that the initial short notice given to him, whereby he was declared provisionally redundant and invited to opt for voluntary retirement, placed him at a disadvantage by requiring him to respond within too short a period of time. This constituted unfair treatment. In view of this, the Applicant is entitled to some compensation, which the Tribunal assesses at three months of his net base salary at the rate in effect at the time of his separation from service.

VI. In view of the above, the Tribunal orders the Respondent to pay the Applicant three months net base salary at the rate in effect on the date of his separation from service.

All other pleas, including the Applicant's request for costs, are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/706
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 706

Case No. 773: ELAHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen; Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Nasreen Elahi, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 December 1993;

Whereas, on 21 December 1993, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(b) To extend the recommendation of the Joint Appeals Board from '... Appellant be considered for all current and future National Officer-B level vacancies in Pakistan ...' (...) to include NO-C level vacancies as well. This would rectify the anomaly of giving preference to non staff members over Applicant who had been a staff member for ten years;

(c) To order removed from Applicant's file two documents written by [the Senior Programme Planning Officer, Islamabad] which have no basis in fact and which have damaged and continue to damage Applicant's career:

1. 'Note for discussion in NO-APC' of 13 August 1987, (...), as these vague charges are untrue and completely unsubstantiated;

> 2. The inter-office memorandum from [the Senior Programme Planning Officer, Islamabad] to RPO [Regional Programme Officer] Lahore on 24 October 1988 as there are many factual errors in this (...).

(d) To find that the Applicant served the Organization for ten consecutive years and was therefore, according to General Assembly resolution 37/126, entitled for every reasonable consideration for a career appointment;

(e) To order reinstatement of the Applicant to a UNICEF Islamabad position at the NO-C level;

(f) To award compensation due the Applicant for the retroactive salary due her at the appropriate level at the time of separation from 1987 to the date of the judgement and any other amount the Administrative Tribunal deems suitable for the lack of due process and discriminatory treatment suffered by the Applicant."

Whereas the Respondent filed his answer on 5 October 1994;

Whereas the Applicant filed written observations on 28 February 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF at the Lahore Office in Pakistan on 23 March 1982, as a Project Officer, Monitoring, Evaluation and Statistics, at the NO-C/IV level, on a six-month, eight-day fixed term appointment. Her appointment was extended for one year, through 30 September 1983, and thereafter for periods ranging from two to six months, through 31 August 1985. The Applicant's post was reclassified with effect from 1 January 1985. Her old post was thereby considered abolished. With effect from 1 September 1985, she was placed in the post of Assistant Project Officer, at the NO-B/III level, on a two year fixed-term appointment. Her appointment was renewed several times, through 31 August 1991 and for four months thereafter, through 31 December 1991. With effect from 1 January 1992, the Applicant's post was upgraded to the NO-C level. Her old post was thereby considered abolished. Her appointment was renewed for two months through 29 February 1992, when she separated from service.

In a performance evaluation report (PER) covering the period 1 April 1983 to 31 March 1984, the Applicant was given an overall rating of "a very good performance." In a second PER covering the period 1 April to 31 December 1984, she was given an overall rating of "a very good performance", with the word "very" struck out on the form.

The next three PERs, covering the periods 1 January to 31 August 1985, 1 September 1985 to 31 December 1986, and 1 January to 31 December 1987, are in a revised UNICEF format with no overall ratings. They are generally favourable. The last one includes a comment by the Chief, Field Operations Section, the Applicant's second reporting officer, that "[t]here was reportedly some communication gap between the [Applicant] and some colleagues in the Country Office which needs to be observed more closely during 1988."

In a confidential note for discussion, dated 13 August 1987, the Acting Representative sought advice from the Appointment and Placement Committee for National Officers in Pakistan (NO-APC) on a request from the Lahore office for a two year extension of the Applicant's appointment. In the note were recorded several "positive observations" about the Applicant. There were also comments on her "negative behaviour," her "inability to work harmoniously with the Islamabad-based staff," her "inflexibility, persistence and what two people would call 'rudeness'." In a confidential note for the record, prepared on 29 October 1987, the Representative stated that he had extended the Applicant's appointment for two months pending review of the case. The review had taken place on 21 October 1987. As a result, he had decided to extend the Applicant's appointment for twenty-two months. The note further stated "as discussed and agreed with [the Applicant], the next PER should attempt to focus particularly on [the Applicant's] abilities in team work, negotiations and relationships, internal as well as external."

Prior to his departure, in a note for the record dated 23 June 1988, the Applicant's first reporting officer, the Regional Programme Officer (RPO), Lahore, stated that the Applicant

"maintains excellent relationships both with the Lahore Office staff and her government counterparts." In October 1988, there was an angry exchange of correspondence between the Applicant and the Programme Officer, Education, Islamabad, regarding an altercation between them which took place during a field visit.

In the Applicant's subsequent PER for the calendar year 1988, the new RPO in Lahore noted "She has a strong sense of responsibility and a great desire to achieve things. In doing so, she might have been too individualistic in the past. However, [the Applicant] is ambitiously working towards improved team work approach." The Applicant's second reporting officer noted that the RPO had assumed her responsibilities in October and "her personal knowledge of the SM[staff member] therefore covers only about three months." He commented that the assessment of the Applicant's "role in team work" was "not thorough" and suggested that her next PER "should focus on these issues."

The Applicant's 1989 and 1990 PERs were completed by the RPO, Lahore, in October 1990, prior to her separation from UNICEF. The RPO's evaluation of the Applicant was favourable. In his comments as second reporting officer, the Chief, FOC, stated, "I believe there are still shortcomings in handling of programmes and programme matters on the part of the [Applicant]." In a PER covering the period 1 January to 30 September 1991, the Applicant was given five "3" ratings ("Good") and one "2" rating ("Passable"). Her first reporting officer commented "[the Applicant] maintains good working relations with counterparts outside the Organization. There have been some problems within UNICEF."

In a memorandum dated 6 August 1991, the Applicant was advised that her appointment had been extended to 31 December 1991, and that her post had been upgraded from the NO-B to the NO-C level, with effect from 1 January 1992. She was "encouraged to apply against the upgraded post as well as other suitable vacant posts at your present and higher level." The Applicant applied for the upgraded post.

A Selection Advisory Panel (SAP) was convened on 22 October 1991, to review the four internal candidates, including the Applicant. The SAP recommended that the upgraded post, as well as two other vacant posts, be advertised externally, and that the internal candidates be considered along with external candidates for a final recommendation. On 15-16 January 1992, the SAP considered eight external candidates for the post. In its recommendations, the SAP stated "The case of the incumbent, [the Applicant], was carefully reviewed. Besides her weaker position with regard to the requirements of the education component she also received a lower rating on several points against the above criteria." The NO-APC, composed of five staff members, including the Programme Officer with whom the Applicant had had an altercation in 1988, considered the SAP recommendations on 20 January 1992. It recommended three external candidates as first, second and third for the post, noting in the minutes of the session, that the Committee "did not find any of the internal candidates suitable for the post, including the incumbent of the post [the Applicant], as compared to the external candidates."

In a memorandum dated 29 January 1992, the Applicant was informed that she had not been recommended for the upgraded post and advised, "in view of the above, your present contract will not be extended beyond its expiry date of 29 February 1992." In a letter dated 2 March 1992, the Applicant requested the Secretary-General, to review the administrative decision not to renew her fixed-term appointment. In a reply dated 7 May 1992, the Deputy Executive Director, Operations, informed the Applicant that the decision would be maintained. On 30 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 15 April 1993. Its considerations and recommendations read, inter alia, as follows:

"Considerations

...

23. ... the Panel concluded that [the Programme Officer, Education's] participation in the deliberations of the NO-APC, even though there was no evidence that she had affected the final decision, meant that those deliberations were procedurally flawed.

...

25. By the terms of its own Administrative Instruction, UNICEF had the obligation to consider Appellant for 'priority placement' in another post ... The Panel, however, found no evidence of even the most perfunctory of attempts. ... the Panel felt that it could not exclude the possibility that the 'reclassification' was a subterfuge employed to rid UNICEF of Appellant without due process.

Recommendations

26. The Panel recommends that Appellant be considered for all current and future NO-B level vacancies in Pakistan as if she were an internal candidate. To assure good faith consideration, Appellant should be provided in advance of the NO-APC consideration with a copy of the vacancy notice and job description for each such post and, in the event she is not selected, she should be sent a written explanation why she was not selected within five working days after the Head of the Office has recorded his decision.

27. ... the Panel recommends that the Secretary-General instruct UNICEF:

(a) To issue instructions to all offices regarding the composition of local APCs, to avoid even the appearance of unfairness and/or impropriety;

(b) To conduct a review, with staff participation, of the posts upgraded under the terms of CF/AI/352 Amend.4 from the date of publication of its first Addendum, i.e., 21 February 1989, to determine whether or not its procedures have been abused; and

(c) To conduct a similar review, with staff participation, of the UNICEF rules and administrative provisions which establish different treatment of locally recruited staff charged against project funds,

> as compared to those against core posts, with a view to establishing whether or not these provisions should be revised. The Panel was concerned, in particular, with assuring equitable treatment of those serving for extended periods on fixed-term appointments against project funds".

On 14 April 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "The Secretary-General has received the report of the Board and accepts, in principle, its recommendations. He has decided that you be considered for all current and future NO-B level vacancies in Pakistan as if you were an internal candidate ... Such consideration of your candidacy by UNICEF shall not, however, exceed a period of one year running from the date you are notified of this decision.
>
> The Secretary-General further instructs UNICEF, in line with the Panel's recommendations, to issue instructions to all local APCs in the field, and to review and update, as necessary, its procedures under the terms of CF/AI/352/Amend.4 in order to ensure fairness and unbiased treatment of staff. UNICEF should continue to review its policy regarding project-financed staff and core staff, and in particular when the former has served UNICEF continuously for a long period of time, a matter that its Executive Board has already mandated".

Whereas the Applicant's principal contentions are:

1. The Applicant was qualified for her upgraded post, and as an internal candidate should have been given priority consideration for the post.

2. The participation of the Programme Officer, Education, prejudiced consideration of the Applicant's candidacy.

3. The Applicant has been a staff member for ten years and is entitled to a reasonable expectancy of career as long as she continues to serve the organization satisfactorily, which she has done.

Whereas the Respondent's principal contentions are:

1. The decision not to select the Applicant for the upgraded post was within the discretionary powers of the Administration and did not violate her rights.

2. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

3. The decision to abolish the Applicant's post was properly implemented and took account of the rights of staff whose posts have been abolished to have the benefit of procedures set out in staff rule 109.1(c).

The Tribunal, having deliberated from 29 June to 28 July 1995, now pronounces the following judgement:

I. The thrust of the Applicant's argument is that, as a staff member of long standing, she was entitled to have a reasonable expectancy of a career appointment, as long as she continued to serve the Organization satisfactorily. She refers to General Assembly resolution 37/126 and she quotes staff regulation 4.4, "... without prejudice to recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

The Applicant also refers to rule 4.1.3 of the UNICEF Personnel Administrative Manual to emphasize that priority in recruitment should be given to internal UNICEF staff. She makes reference also to rule 4.5.37, which provides that the Administration should "... when reviewing appointments of staff to posts graded at a higher level than their present level, also make a judgement as to the capability of the candidates to perform the specific tasks of the higher level post. This includes the staff member's background of academic preparation of work experience to

ensure it is sufficiently varied to offer versatility in handling related assignments, and ability to assume administrative and managerial responsibilities that normally accrue with seniority."

The Applicant suggests that she must have performed satisfactorily in her years of service as her contracts were extended throughout that period. She makes this submission in the context of rule 5.2.3, "... Extensions of fixed-term appointment beyond the normal period ... will not normally be allowed for reasons of substandard performance."

II. The Tribunal has examined the history of the Applicant's career with UNICEF. She was first appointed in 1982 as a Project Officer at the NO-C level. In 1985, her post was reclassified and therefore, in accordance with UNICEF practice, considered to be abolished. The Applicant was placed in another post as Assistant Project Officer at the NO-B level. Because no post at the NO-C level was available, the Applicant says that her career was adversely affected as she was then placed against a post at the NO-B level.

The Applicant claims that the Officer-in-Charge seemed to develop a personal animosity against her when he wrote, in 1987, what she describes as an unwarranted note to the Appointment and Placement Committee (APC). The note called into question, in the main, her ability to maintain good working relationships with her co-workers. In contrast, the Regional Programme Officer, upon his departure in 1988, praised the Applicant for maintaining excellent relationships with the Lahore office staff and her government counterparts there. The Applicant's performance evaluation reports could, for the most part, be regarded as favourable. In 1991, the Applicant was advised that, again, the post she encumbered would be reclassified, from the NO-B to the NO-C level, and again, in accordance with UNICEF practice, her post would be considered abolished. She was invited to apply for the newly created NO-C post, but it was filled by an external male candidate.

III. In accordance with UNICEF's practice, under administrative instructions 352/Amend.4 and 352/Amend.4/Add.1, an upgraded post is regarded in the budget as a "new post" and is advertised for the purposes of recruitment. Under these rules, the incumbent of the post need not be selected for the post. In that case, "the Organization is committed to give every reasonable consideration for providing placement of the incumbent in another suitable vacant post." The Applicant, however, when she was not appointed to her upgraded post, was not placed in another suitable vacant post. Rather, her appointment was not extended.

The Tribunal notes the JAB's reference to the possibility that the reclassification of the Applicant's post constituted a "subterfuge" employed to rid UNICEF of the Applicant without due process. However, for the purpose of deciding this case, the Tribunal does not find it necessary to examine the legality of the procedure established by UNICEF to upgrade posts and advertise them as vacant, without according priority consideration to the incumbents of these posts.

IV. The Tribunal first considers the decision of the Respondent not to appoint the Applicant to her upgraded post. The Respondent, in his arguments, draws attention to the latitude which must be afforded the Secretary-General in appointing and promoting staff. He refers to the procedures which were employed in this case. The Applicant and other candidates were considered by a Selection Advisory Panel. It presented its recommendations to the APC, which unanimously recommended three external candidates, one of whom was appointed. The Applicant contends that, as an internal candidate and as a female, she should have been accorded priority consideration. The Respondent contends that the choice was made on the advice of the joint bodies, which had fairly reviewed the case in accordance with established rules and procedures.

V. It is not the Tribunal's function to place itself in the position of the APC in its work of evaluating candidates. It will confine itself to determining whether the procedures adopted were fair or whether the recommendation made by the APC was fundamentally flawed.

The significant factor to be taken into account in this determination is the presence in the APC of the Programme Officer, Education, Islamabad. The Applicant had an angry exchange of correspondence relating to an altercation which took place with this staff member during a field visit. The JAB recognized that the fact that she was subsequently a member of the APC which considered the Applicant's candidacy gives rise to the perception of bias, if not actual bias. The Tribunal agrees with the JAB and concludes that the procedure was fundamentally flawed by the Programme Officer's participation.

VI. The Tribunal, in examining the Respondent's actions following the decision not to appoint the Applicant to the upgraded post, again finds a failure, recognized by the JAB, to accord the Applicant every reasonable consideration for placement in another suitable post. The JAB found "no evidence of even the most perfunctory of attempts" to do so. In this regard, the Respondent did not act in accordance with administrative instructions AI/352/Amend.4 and AI/352/Amend.4/Add.1.

VII. For the foregoing reasons, and in the light of the fact that the Applicant initially held an NO-C post, the Tribunal orders that:

1. The Applicant be given priority consideration for placement in all current and future vacant NO-B and NO-C level posts for which she is qualified and wishes to be considered.

2. The Applicant be paid compensation in the amount of six months of her net base salary at the rate in effect on the date of her separation from service.

3. All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary